

Supreme Court, U. S.
FILED

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MANUEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1976

No. . . . 76 - 48

THE SANKO STEAMSHIP CO., LTD.,

Petitioner,

against

**NEWFOUNDLAND REFINING COMPANY LIMITED,
NEWFOUNDLAND REFINING COMPANY LIM-
ITED U.S.A., PROVINCIAL BUILDING COMPANY
LIMITED, PROVINCIAL REFINING COMPANY
LIMITED, PROVINCIAL HOLDING COMPANY
LIMITED and SHAHEEN NATURAL RESOURCES
COMPANY, INC.,**

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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No.

THE SANKO STEAMSHIP CO., LTD., *Petitioner,*
against

NEWFOUNDLAND REFINING COMPANY LIMITED, NEWFOUND-
LAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL
BUILDING COMPANY LIMITED, PROVINCIAL REFINING COM-
PANY LIMITED, PROVINCIAL HOLDING COMPANY LIMITED
and SHAHEEN NATURAL RESOURCES COMPANY, INC.,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To the Honorable the Chief Justice and Associate
Justices of The Supreme Court of the United States:*

Petitioner prays that a writ of certiorari be issued to
review the judgment of the United States Court of Appeals
for the Second Circuit in the above entitled action.

Opinions Below

The opinion for the United States Court of Appeals for
the Second Circuit is unreported. The opinion of the
United States District Court for the Southern District of
New York is also unreported. Copies of both opinions are
annexed hereto as Appendices A and B respectively.

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 by reason of the fact that the Court of Appeals for the Second Circuit has erroneously construed the decision of this Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L.Ed. 2d 513, 92 S.Ct. 1907 (1971) (hereinafter sometimes referred to as *Bremen*).

The date of the Judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed and the date of entry is April 15, 1976.

Question Presented for Review

Did the Court of Appeals for the Second Circuit correctly interpret the decision of this Court in *The Bremen v. Zapata Off-Shore Co.*, supra, in holding that under said decision the District Court lacked jurisdiction to allow an aggrieved party to a maritime contract to invoke Supplemental Rule B (1) of the Supplemental Rules for Certain Admiralty and Maritime Claims¹ and retain security when such agreement included a foreign forum clause enforceable under *The Bremen v. Zapata Off Shore Co.*, supra.

¹ Supplemental Rule E(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure states in part:

"Rule B Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, and Process.

With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. • • • In addition, or in the alternative, the plain-

(footnote continued on following page)

Statement

This is an action for breach of three time charter parties entered into between petitioner and respondent Newfoundland Refining Company Limited (N.R.C.) on or about August 8, 1972. The United States District Court had jurisdiction under 28 United States Code, Section 1333(1).

On the 17th day of February, 1976 petitioner instituted an action in the United States District Court for the Southern District of New York in Admiralty pursuant to Rule 9(h) of the Federal Rules of Civil Procedure against respondents for failure to pay charter hire in the sum of \$8,112,323.68 due it under the aforesaid charter parties. On the same day petitioner obtained from the said District Court (Whitman Knapp, D.J.) pursuant to Rule B(1) of the Supplemental Admiralty Rules,² and Section 6201 of the Civil Practice Law and Rules of the State of New York (C.P.R.L.)³ a temporary restraining order against respondents and The Sumitomo Bank, Ltd., European American Bank & Trust Co. and Manufacturers Hanover Trust Company preventing respondents from removing, releasing or secreting the cumulative amount of \$3,000,000 from accounts which respondents had at said banks, together with an order to show cause as to why petitioner was not en-

(footnote continued from preceding page)

tiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. • • •"

² See note 1, supra.

³ Section 6201 of the New York Civil Practice Law and Rules states in relevant part:

"An order of attachment may be granted in any action • • • where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. The defendant is a foreign corporation or not a resident or domiciliary of the state; • • •"

titled to an attachment of funds and/or credits in any and all accounts maintained by respondents at said banks in the aforesaid cumulative account.

Several hearings were thereafter had before the District Court and the Court of Appeals for the Second Circuit that are not germane to this petition. During this period, however, petitioner deleted Manufacturers Hanover Trust Company from the temporary restraining order, as it held no funds or other credits of respondents. However, during this period, while the temporary restraining order was in effect, counsel for respondents' advised that the Sumitomo Bank Ltd. had removed \$905,739.52 from one of the respondents' account at said bank without authorization.⁴

On March 4, 1976, a hearing was held before the District Court which entered a judgment dated the same day, dismissing petitioner's complaint and vacating the temporary restraining order for lack of jurisdiction on the authority of the decision of this Court in *Bremen*.⁵

Petitioner thereafter filed an appeal with the United States Court of Appeals for the Second Circuit and on April 15, 1976 that Court affirmed the judgment of the District Court on the opinion of Judge Knapp and on the authority of *The Bremen v. Zapata Off-Shore Co.*, supra.⁶ Thereafter petitioner filed a petition with said Court of Appeals for the Second Circuit seeking a re-argument *en*

⁴ Said withdrawal is presently the subject of an action in the United States District Court for the Southern District of New York.

⁵ Said opinion is found in Appendix A, *infra*, at pages A1 to A6.

⁶ Said decision is found in Appendix B, *infra*, at pages B1 to B2.

banc of its decision of April 15, 1976. On June 3, 1976 the Court of Appeals for the Second Circuit denied the petition.⁷

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals for the Second Circuit erroneously interpreted the decision of this Court in *The Bremen v. Zapata Off-Shore Co.*, supra. If this error remains uncorrected a substantial segment of Admiralty law and practice will be changed—a result not intended by this Court in that decision.

The Courts below ruled that under the authority of *The Bremen v. Zapata Off-Shore Co.*, supra, dismissal of petitioner's complaint and temporary restraining order was required because of the following clause contained in all three charter parties:

"40.(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.

(b) Any dispute arising under this charter shall be decided by The English Courts to whose jurisdiction the parties agree whatever their domicile may be:

Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force."

⁷ A copy of the Ruling of the Court of Appeals for the Second Circuit denying the petition for re-argument *en banc* is annexed hereto as Appendix C, *infra* at pages C1 to C2.

In *The Bremen v. Zapata Off-Shore Co.*, supra, this Court held that forum selection clauses in contracts are valid and enforceable absent a showing that enforcement thereof would be unreasonable or unjust or that such clause was invalid for reasons such as fraud or overreaching.

This Court in *Bremen* also gave its "policy" reasons for the enforcement of forum selection clauses, stating:

"Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left open to any place where the *Bremen* or Unterweser might happen to be found (footnote omitted). The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." (407 U.S. at pps. 13 and 14)

The Court of Appeals in the instant case interpreted this Court's decision in *Bremen* as standing for the proposition that if a contract contains a forum selection clause the District Court was required to dismiss the United States action for lack of jurisdiction and could not make any alternative arrangements whereby the petitioner could retain the security it may have obtained through Rule B(1) of the Supplemental Admiralty Rules.*

Petitioner respectfully submits that the Court of Appeals for the Second Circuit has erroneously construed the holding in *The Bremen v. Zapata Off-Shore*, supra. It is submitted that *Bremen* stands solely for the proposition that where an agreement contains a forum selection clause such clause should be enforced absent a showing that enforcement thereof would be unreasonable or unjust or that

* See note 1, supra.

the clause is invalid for reasons such as fraud or overreaching. *Bremen* does not stand for the proposition that where an agreement contains a forum selection clause, one of the parties to such an agreement is precluded from instituting an action outside the stipulated forum and obtaining security for its claim while being compelled to litigate on the merits only in the stipulated forum.

Clearly, this Court did not decide the issue whether one party to an agreement containing a foreign forum selection clause, assuming it was valid, was precluded from maintaining an action outside the selected forum and obtaining security pending determination of the dispute in the selected forum. The procedural history of *Bremen* unarguably established this fact. The District Court in *The Bremen v. Zapata Off-Shore Co.*, supra, simply declined to dismiss the action for *forum non conveniens*—thus the propriety of staying the action while retaining the security posted pending resolution of the dispute in England was not reached and therefore never ruled upon by the Court of Appeals for the Fifth Circuit nor this Court. The case ultimately was remanded to the District Court where Zapata retained the security it had obtained while litigating in England.

The issue herein is whether the party instituting an action has the right to do so outside the selected forum, provided it anticipates having its action stayed if security is obtained, pending a resolution of the dispute in the stipulated forum.

As stated by this Court in *Bremen* a forum selection clause is inserted in agreements such as charter parties so that the parties to the agreement know in advance where disputes will be resolved; but this is not to say, nor did this Court hold, that by inserting such a clause the parties have agreed to waive rights to obtain security elsewhere.

As *Bremen* did not reach the issue of whether a party to an agreement containing a forum selection clause can

institute an action outside the selected forum and obtain security pending determination of the dispute in the selected forum, it is submitted that case law prior and subsequent to the decision in *Bremen* is controlling.

The United States District Courts in the decisions in *Carbon Black Export v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958) Cert. Dism. 359 U.S. 180 and *Indussa Corporation v. S.S. Ranborg*, 260 F.Supp. 660 (S.D.N.Y., 1966) reversed 377 F.2d 200 (2nd Cir. 1967), held that the forum selection clauses involved in those cases were enforceable but said courts also held that the security obtained in the actions before said courts would stand. While it is true that in both cases the respective Court of Appeals reversed its District Court, they did so only on the issue of the enforceability of the forum selection clauses and not on the issue of whether the party instituting the action outside the selected forum could retain the security obtained pending determination of the dispute in the foreign forum.

For other pre-*Bremen* decisions dismissing actions brought in United States and relegating litigants to foreign jurisdictions on condition that security be posted, see *Hatzoglou v. Asturias Shipping Company, S.A.*, 193 F. Supp. 195 (S.D.N.Y. 1961), *Brillis v. Chandris (U.S.A.) Inc.*, 215 F. Supp. 520 (S.D.N.Y. 1963), *Garis v. Compania Maritima San Basilio, S.A.*, 261 F. Supp. 917 (S.D.N.Y. 1966), aff'd. 386 F.2d 155 (2 Cir. 1967).

In a recent post-*Bremen* decision, *Kooperativa Forbundet, Stockholm v. Vaasa Line Oy, Partenreederei M.S. Ursula Jacob and the S.S. Ursula Jacob, etc.*, 1975 A.M.C. 1972 (S.D.N.Y.) (unreported elsewhere). The District Court (Ward, D.J.) conditionally granted a motion for an order dismissing the action on the ground of *forum non conveniens*. This was not a COGSA case and involved an in rem action by a Swedish shipper against a Finnish ves-

sel for cargo damage. The jurisdiction clause in the bill of lading read as follows:

"Any claim against the Carrier arising under this Bill of Lading shall be decided at the principal place of business of the Carrier in accordance with the law of the place to which the Carrier and the Merchant hereby submit themselves." (1975 A.M.C. at p. 1973)

The court citing to *The Bremen v. Zapata Off-Shore Co.*, supra, held that the above clause was a forum selection clause and was prima facie valid and enforceable. The Court, however, granted defendant-shipowner's motion to dismiss on condition

"that both defendants submit to the jurisdiction of the courts of Finland without raising any defenses based on laches or time bars, provided such jurisdiction is invoked by plaintiff in a reasonable time and that defendant shipowner deposit a bond in Finland equal to that in this action and incorporating the same terms and conditions." (1975 A.M.C. at p. 1975)

B

The decision of the Court of Appeals for the Second Circuit that it was required under the authority of *Bremen* to dismiss petitioner's complaint has impliedly held invalid Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims under circumstances similar to the case at bar.

It is submitted that the Court below has impliedly held that traditional Writ of Foreign Attachment in admiralty or the use of State Court remedies provided for by Supplemental Rule B(1)⁹ cannot be used where the contract

⁹ See note 1, supra.

contains a foreign forum selection clause.¹⁰ In short, security will no longer be allowed in that large body of cases where maritime contracts contain a foreign forum selection clause. If this rule should prevail, parties to maritime contracts might be well advised to forego the luxury of forum selection clauses if possible, although this Court stated in *Bremen* that such clauses are "an indispensable element in international trade, commerce and contracting." It is submitted that this Court in *Bremen* did not intend to curtail the use of Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims.¹¹

C.

The decision of the Court of Appeals for the Second Circuit that it was required under the authority of *Bremen* to dismiss Petitioner's complaint has impliedly held invalid Section 8 of Article 9 of the United States Code.

The foreign forum selection clauses in the instant case provide that either party may elect to have disputes referred to arbitration in England rather than to the British Courts.¹² This privilege of election does not affect the application of Supplemental Rule B.

¹⁰ Indeed, serious doubt is cast upon the continued viability of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims; Said Rule provides in pertinent part:

"ACTIONS IN REM: SPECIAL PROVISIONS

(1) *When Available.* An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto."

¹¹ See note 1, *supra*.

¹² Such a clause is also a forum selection clause: See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) wherein this Court stated:

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." (417 U.S. at pg. 519)

Section 8 of the Arbitration Act, Article 9 United States Code¹³ provides if an agreement contains an arbitration clause and if one party thereto has a claim which is otherwise cognizable in admiralty, such a party may institute an arbitration proceeding "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings."

Assuming one chooses to institute an arbitration proceeding in accordance with Section 8, the Court can, on its own initiative, stay plaintiff's action and order the parties to arbitration or the plaintiff may move under Section 3, Article 9 United States Code to stay its own action and request the Court to order the parties to arbitration.¹⁴

Accordingly, it is submitted that the following cases which enforced foreign arbitration clauses while permitting suits to be instituted outside the selected forum for the purpose of obtaining security have been disapproved: *Danielsen v. Entre Rios Rys. Co.*, 22 F.2d 326 (D.C. Md. 1927) (arbitration in England); *The Quarrington Court*, 25 F. Supp. 665 (S.D.N.Y. 1938) (arbitration in England); *Uniao De Transportadores v. Companhia De Navegacao, etc.*, 84 F. Supp. 582 (E.D.N.Y. 1949) (arbitration in Portugal); *International Refugee Organization v. Republic S.S. Corp.*, 93 F. Supp. 798 (D.C. Md. 1950) appeal

¹³ Section 8 of Article 9 United States Code states:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

¹⁴ *Commercial Metals Co. v. International Union Marine Corp.*, 294 F. Supp. 570 (S.D.N.Y. 1968); cf. *Kurt Orban Company v. S.S. Clymenia*, 318 F. Supp. 1387 (S.D.N.Y., 1970).

dismissed 189 F.2d 858 (4th Cir. 1951) (arbitration in England; *Fox v. The Giuseppe Mazzini*, 110 F.Supp. 212 (E.D.N.Y. 1953) (arbitration in England); *Mannesmann Rohrleitungsbau v. S.S. Bernhard Howaldt*, 254 F. Supp. 278 (S.D.N.Y. 1965) (arbitration in Holland); *Konstantinidis v. S.S. Tarsus*, 248 F. Supp. 280 (S.D.N.Y. 1965) aff'd 354 F.2d 240 (2d Cir. 1965) (arbitration in Turkey).

It is respectfully submitted that this Court in deciding *Bremen* did not intend to hold invalid Section 8 of Article 9 of the United States Code or to overrule the decisions cited above.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of all proceedings, of the case entitled on its docket No. 76-7060, *The Sanko Steamship Co., Ltd., Plaintiff-Appellant, against Newfoundland Refining Company Limited, Newfoundland Refining Company Limited U.S.A., Provincial Building Company Limited, Provincial Refining Company Limited, Provincial Holding Company Limited and Shaheen Natural Resources Company, Inc., Defendants-Appellees*; and that said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

Dated: New York, N. Y.,
July 13, 1976

Respectfully submitted,

THE SANKO STEAMSHIP CO., LTD., Petitioner

By SHELDON A. VOGEL

APPENDIX A

Opinion of the United States District Court.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

THE SANKO STEAMSHIP CO., LTD.,

Plaintiff,

—against—

NEWFOUNDLAND REFINING COMPANY, LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Defendants.

MEMORANDUM AND ORDER

76 Civ. 756

KNAPP, D.J.

The plaintiff, pursuant to Admiralty Rule B(1) and F.R.C.P. 64, has invoked "the remedies provided by state law for attachment" and seeks to levy upon certain New York bank balances claimed to be owing to some or all of the defendants. The particular provision of state law which plaintiff has invoked is C.P.L.R. § 6201, which so far as relevant, provides:

"An order of attachment may be granted *in any action*, . . . where the plaintiff has demanded and would be entitled, . . . to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state;" [emphasis supplied]

Opinion of the United States District Court.

Plaintiff duly filed an action in this court alleging breach by defendants of a time charter party agreement. In order to avoid the pitfalls suggested in *Sugar v. Curtis Circulation Co.* (S.D.N.Y. 1974) 383 F.Supp. 643, plaintiff did not request the court to issue an attachment *ex parte*, but sought such relief by an appropriate Order to Show Cause.¹

Thus forewarned, the defendant countered with a motion to dismiss² the underlying action, contending that if such motion were granted there would be no "action" to provide the underpinnings of an attachment under the above-quoted statute. For reasons which follow, we believe that defendants' position is well-taken, that the action should be dismissed, and, accordingly, that there is no basis for an attachment.

DISCUSSION

The underlying action against the defendants is for breach of contract. The contract sued upon, however, contains a forum selection clause confining actions for disputes arising thereunder to the Courts of England. Thus the contract provides:

"40. (a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.

(b) Any dispute arising under this charter shall be decided by The English Courts to whose jurisdiction the parties agree whatever their domicile may be:

Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification of re-enactment thereof for the time being in force."

Opinion of the United States District Court.

It is defendants' contention that this clause is valid and precludes the plaintiff from invoking the jurisdiction of this court and, therefore, requires that the action be dismissed. We find that defendants' position is conclusively established by *Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1. The case laid at rest any doubt as to the enforceability of such clauses and specifically held that they were applicable to *in rem* actions.³ *Id.* at 20. Plaintiff correctly points out that no question of the validity of an attachment was before the Court in that case.⁴ However, we deem that circumstance to be irrelevant. The Supreme Court was obviously not concerned with the provisions of New York C.P.L.R. § 6201. What it did establish was a rule of law which entitles defendants to a dismissal of this action. Such dismissal makes an attachment unavailable under C.P.L.R. § 6201.⁵

Ordinarily this ruling, making any attachment unavailable, would make it unnecessary to determine against which of the several defendants a duly issued attachment would have been effective. However, the Court of Appeals⁶ has indicated a desire to have a full record before it, so we shall proceed to make findings on this latter issue.

With respect to the attachability of the funds of the defendants other than the first named defendant (assuming an otherwise valid attachment) we find as follows:

(a) On the papers before us plaintiff has not born the burden of establishing its entitlement to an attachment of the funds of any but the first named defendant; however,

(b) under the doctrine announced in Judge Moore's opinion in *National Marine Service Inc. v. C. J. Thibodeaux & Company* (5th Cir. 1974) 501 F.2d 940 (by which we are persuaded), plaintiff has shown enough to entitle it to conduct further discovery on this issue.

Opinion of the United States District Court.

Accordingly, for reasons more fully stated on the record in open court, should the Court of Appeals reverse my decision as to the applicability of *Bremen* (and issue no further instructions) I shall immediately issue an attachment as to the first named defendant, and hold the matter in *status quo* as to the remaining defendants, referring the issue as to their status to a Magistrate with instructions to supervise discovery and to hear and report.

In the meantime, for the reasons stated in the first part of this opinion, the action is dismissed and the TRO is vacated. The order vacating the TRO is, however stayed until March 11, 1976 at 5:00 P.M. on condition that:

1. All defendants may make disbursements from the accounts in the Sumitomo Bank, Ltd., the European-American Bank & Trust Co., and Manufacturers Hanover Trust Company, based upon the undertaking of all defendants to plaintiff that the only payments which will be made from such bank accounts will be payments of current accounts in the ordinary course of business; conformance with such undertaking of defendants shall not be the responsibility of said banks.
2. In the event the attachment of any of said bank accounts should be reinstated such attachment shall be deemed to have been made upon the amounts in each of said accounts as of the date and hour each of such banks were served with a copy of the temporary restraining order dated February 17, 1976, and plaintiff shall be deemed to have an attachment lien on the company's cash proceeds to the extent thereof.
3. The security posted by plaintiff shall be extended until 5:00 P.M. March 11, 1976.

Opinion of the United States District Court.

4. Anything in the foregoing to the contrary notwithstanding, the banks may honor any checks presented to them on any of the accounts subject to the restraining order, it being the defendants' responsibility to see that their representations are carried out.

SO ORDERED.

Dated: New York, New York
March 4, 1976.

/s/
WHITMAN KNAPP, U.S.D.J.

Opinion of the United States District Court.

FOOTNOTES

¹ Contained in said Order to Show Cause, which the Court made returnable 3 days later, was a temporary restraining order, enjoining defendants from removing or releasing \$3,000,000 from their respective New York bank accounts. This TRO was later modified on certain conditions which allowed the defendants to conduct their daily business affairs.

² This "motion" was made orally on the record, since the press of time did not permit of the formal filing of the appropriate papers.

³ The Court did leave open, however, the question of whether the clause there involved was "invalid for such reasons as fraud or overreaching" or whether the enforcement of such clause "would be unreasonable or unjust" *Id.*, at 15. In order to meet that burden, the Court observed that the party seeking to escape the forum selection clause must demonstrate that trial in the contractual forum "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court". *Id.*, at 18. At oral argument before us, the instant plaintiff conceded that it could make no such showing.

⁴ The parties in *Bremen* specifically eliminated that issue by agreeing upon the posting of security that was to be available in London as well as Florida. See 407 U.S. 1, 4, n. 3, as explained by Petitioner's Reply Brief on certiorari, at p. 10.

⁵ We note in passing that nothing turns on the circumstance that plaintiff proceeded by Order to Show Cause rather than by procuring an *ex parte* attachment. Had the latter course been followed, a dismissal of the action would have instantly triggered a *vacatur* of the attachment. So far as we know, there is no provision of New York law which would authorize holding an attachment "in limbo" pending the outcome of litigation going forward in some other jurisdiction.

⁶ Since \$3,000,000 and a possible question of law of first impression are here involved, plaintiff wished to and did immediately appeal my decision. Before agreeing to hear the case on the merits, the Court of Appeals remanded same to this court for the purposes of establishing a complete record with respect to the relationship between the several defendants and the plaintiff.

APPENDIX B

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of April, one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK

Associate Justice, United States
Supreme Court, Retired

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

76-7060

THE SANKO STEAMSHIP CO., LTD.,

Appellant,

v.

NEWFOUNDLAND REFINING COMPANY, LIMITED, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Opinion of the Court of Appeals.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and it hereby is *affirmed* on the opinion of Judge Knapp dated March 4, 1976 (app. 73-80) and on the authority of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1971).

TOM C. CLARK
TOM C. CLARK
Associate Justice

WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

ELLSWORTH A. VAN GRAAFEILAND
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

APPENDIX C**Order Denying Petition for Rehearing *En Banc*.**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of June, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges
HON. TOM C. CLARK,
Associate Justice

Docket No. 76-7060

SANKO STEAMSHIP CO. LTD.,

Plaintiff-Appellant

v.

NEWFOUNDLAND REFINING COMPANY, LIMITED, NEWFOUND-
LAND REFINING COMPANY, LIMITED, U.S.A., PROVINCIAL
BUILDING COMPANY, LIMITED, PROVINCIAL REFINING COM-
PANY, LIMITED, PROVINCIAL HOLDING COMPANY, LIMITED
and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Defendants-Appellees

Order Denying Petition for Rehearing En Banc.

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, SANKO STEAMSHIP Co. LTD.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO

A. DANIEL FUSARO,
Clerk